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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/538,835	06/13/2005	Stephane Desjonqueres	05076	5184

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ALEXANDRIA, VA 22314

EXAMINER	
STONE, CHRISTOPHER R	
ART UNIT	PAPER NUMBER
1614	

MAIL DATE	DELIVERY MODE
06/24/2009	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/538,835	DESJONQUERES, STEPHANE	
	Examiner	Art Unit	
	CHRISTOPHER R. STONE	1614	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *04 March 2009*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *27-29 and 31-50* is/are pending in the application.

4a) Of the above claim(s) *40-50* is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *27-29 and 31-39* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Applicants' arguments, filed March 3, 2009, have been fully considered but they are not deemed to be persuasive. Rejections and/or objections not reiterated from previous office actions are hereby withdrawn. The following rejections and/or objections are either reiterated or newly applied. They constitute the complete set presently being applied to the instant application.

Status of Claims

Claims 27-29 and 31-50 are pending. Claims 40-50 are withdrawn from further consideration as being drawn to a nonelected invention. Claims 27-29 and 31-39 are currently under examination.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 27-29 and 31-39 are rejected under 35 U.S.C. 103(a) as being unpatentable over Desjonqueres (EP 1077061, listed on IDS filed June 13, 2005, translation provided).

Desjonqueres teaches a pharmaceutical composition, in the form of an oil or milk (i.e. fluid compatible with use as a spray, paragraphs 0016 and 0017, claims 9-11), comprising peroxidized lipids which have a degree of peroxidation of between 5 and 600 milli-equivalents per kilogram or between 30 and 500 milli-equivalents per kilogram

(paragraph 0007 and 0010) and colloidal silica (paragraphs 0017, Examples 1-5, claims 9-11), wherein said peroxidized lipids are obtained by peroxidation of lipids from natural plant origins, e.g. almond oil, grapeseed oil, etc. (paragraph 0013). Desjonqueres further teaches said composition, wherein the peroxidized lipids comprise partially oxidized triglycerides of the formula of claim 35 (paragraph 0015). Desjonqueres does not explicitly teach the concentrations of silica of instant claims 27-29, e.g. 0.5 to 2%. However, Desjonqueres teaches said composition comprising 2 to 99% peroxidized oils (i.e.1% or less colloidal silica) and up to 9% colloidal silica (Examples 1-5, claims 9-11).

Therefore it would have been prima facie obvious to one of ordinary skill in the art at the time of the instantly claimed invention to use any concentration of silica within this range, e.g. 2%, 3.5% etc., to form an oil or milk product since this range was taught to be appropriate to prepare the oil or milk composition of Desjonqueres, thus resulting in the instantly claimed composition with a reasonable expectation of success. Desjonqueres does not explicitly teach that the composition is compatible with use as a spray, the viscosity of the composition at 20°C, or the density of the composition; however these characteristics flow from physical properties of the composition and it's components and are necessarily present in the prior art. If the prior art teaches the identical chemical structure, the properties applicant discloses and/or claims are necessarily present. *In re Spada*, 911 F.2d 705, 709, 15 USPQ2d 1655, 1658 (Fed. Cir. 1990).

Response to Arguments

Applicant argues that the last sentences of paragraphs 0016 and 0017 in the translation of Desjonqueres should read "an oily gel based on colloidal silica" and not "an oily gel-based colloidal silica". This is point is moot since these paragraphs provide motivation to formulate the composition in a sprayable liquid form (e.g. a milk) and claims 9-11 cited above provide motivation to add silica to said composition in liquid form. Applicant argues that there is no suggestion of incorporating silica into a sprayable liquid form (e.g. an oil or milk). This is not found persuasive because, as noted above, Desjonqueres does suggest an oily composition with less 1% or less colloidal silica (claims 9-11), which as Applicant notes, would necessarily be in the form of a sprayable liquid (p. 6 of the reply filed March 4, 2009, second to last paragraph), which is taught to be an appropriate form the composition (claim 9). Applicant argues that in the disclosed example and preferred embodiments that the gel of Desjonqueres was essentially a solid and contained 7 or 9% silica. This is found unpersuasive because a reference may be relied upon for all that it would have reasonably suggested to one having ordinary skill the art, including nonpreferred embodiments. Merck & Co. v. Biocraft Laboratories, 874 F.2d 804, 10 USPQ2d 1843 (Fed. Cir.), cert. denied, 493 U.S. 975 (1989). Disclosed examples and preferred embodiments do not constitute a teaching away from a broader disclosure or nonpreferred embodiments. In re Susi, 440 F.2d 442, 169 USPQ 423 (CCPA 1971). "A known or obvious composition does not become patentable simply because it has been described as somewhat inferior to some other product for the same use." In re Gurley, 27 F.3d 551, 554, 31 USPQ2d 1130,

1132 (Fed. Cir. 1994). Applicant argues that the only compositions to which silica would be added is to an essentially solid gel that is not sprayable. This is an allegation without factual support and is therefore unpersuasive. As noted above, Desjonqueres does suggest an oily composition with less 1% or less colloidal silica (claims 9-11), which as Applicant notes, would necessarily be in the form of a sprayable liquid (p. 6 of the reply filed March 4, 2009, second to last paragraph), which is taught to be an appropriate form the composition (claim 9).

Conclusion

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL.** See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to CHRISTOPHER R. STONE whose telephone number is

(571)270-3494. The examiner can normally be reached on Monday-Thursday, 7:30am-4:00pm EST.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Ardin H. Marschel can be reached on (571) 272-0718. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

11June2009
CRS

/Patricia A. Duffy/
Primary Examiner, Art Unit 1645